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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Although petitioners have framed three separate questions, the case really presents only one:

> Does the Fourteenth Amendment invalidate a state constitutional amendment which prohibits a state court from imposing mandatory student assignment and transportation as a desegregation remedy unless that remedy is required by the Federal Constitution?

The decision below by the California Court of Appeal decided two questions: (1) that the state constitutional amendment in question (known as "Proposition 1") is constitutional, and (2) that the trial court's desegregation plan violated Proposition 1 because the record did not contain any evidence of intentional, *de jure* segregation of students.

Petitioners have not challenged the Court of Appeal's second holding. It is therefore undisputed that the record contains no evidence of intentional, *de jure* segregation of students that would constitute a violation of the Fourteenth Amendment.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of the City of Los Angeles, governing body of the Los Angeles Unified School District ("the District") opposes the petition for certiorari, as follows:

STATEMENT OF THE CASE

I.

PROCEEDINGS IN THE TRIAL COURT.

This case was filed on August 12, 1963, several weeks after the California Supreme Court stated in dictum in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 881-82, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that article I, section 7(a) of the California Constitution required school districts to remedy *de facto* segregation in their schools.

On May 12, 1970, the trial court entered a judgment and writ of mandate which required the District to prepare a

plan for the desegregation of its schools. (Clerk's Transcript ["C.T."] at 615.) Following an appeal by the District, the California Supreme Court affirmed with modification and remanded with instructions to take "reasonably feasible steps to alleviate segregation and its accompanying harm." *Crawford v. Board of Education of the City of Los Angeles*, 17 Cal.3d 280, 286, 551 P.2d 28, 130 Cal.Rptr. 724 (1976). The court stated in dictum that the trial court's findings adequately supported the conclusion that segregation in the District was *de jure* in nature, but it expressly did not rest its decision on that characterization. 17 Cal.3d at 285. Instead, the court reaffirmed its dictum in *Jackson* and held that there was "an obligation under the State Constitution" to undertake reasonably feasible steps to alleviate school segregation "whether the segregation be de facto or de jure in origin." 17 Cal.3d at 290 and 301. Because the California Supreme Court's decision was based upon its construction of the California Constitution, the District did not seek review before this Court.

Following remand, the trial court commenced renewed proceedings in February 1977. On March 18, 1977, the District submitted its first desegregation plan, which included mandatory reassignment of students on a limited basis. After a three month trial, the trial court on July 5, 1977, rejected the plan and ordered the District to return a new plan within 90 days, after examining "all reasonable alternatives."

The District did not appeal the trial court's rejection of its first plan, but instead returned a new plan ("Plan 2") on October 3, 1977, within the 90-day period specified by the court. Following hearings, the trial court approved implementation of Plan 2 beginning in September 1978, describing the plan as "an important initial step toward eventual compliance with the writ of mandate." (C.T. at 6828.)

During the summer of 1978, intervenor Bustop moved to stay implementation of Plan 2, contending that the plan violated the constitutional rights of schoolchildren. The trial court denied the motion, but the Court of Appeal granted a stay incident to Bustop's appeal. The California Supreme Court vacated the stay and Justices Rehnquist and Powell each refused to intervene pending review by this Court. *Bustop, Inc. v. Board of Education of the City of Los Angeles*, 439 U.S. 1380, 1384 (1978).

Plan 2 commenced operation on September 12, 1978. By providing for mandatory reassignment of approximately 40,000 students attending grades 4 through 8 of every school with a white enrollment over 70% (except one, which is geographically isolated), it was one of the nation's most extensive plans of mandatory student reassignment. (*See generally*, C.T. at 2730-5314.) Plan 2 also provided for voluntary desegregation through the magnet school and permits with transportation programs.

In March 1979 the District filed a comprehensive analysis of the first semester performance of Plan 2. Because of the plan's failure to desegregate, due in large part to unprecedented losses of white students, the District recommended no further additions to the mandatory reassignment component and instead proposed expansion of the voluntary programs.

By Fall 1979, all parties wanted Plan 2 discontinued. On October 22, 1979, the trial court commenced renewed hearings to consider alternatives to Plan 2. The District proposed an all-voluntary desegregation plan which would have expanded the existing magnet program and permits with transportation program to include a combined total of 50,000 students, developed 16 educational complexes containing 189 schools and 154,000 students, and expanded special programs for predominantly minority schools. Petitioners

and most other parties presented their own desegregation approaches.

On November 6, 1979, fifteen days after the trial began, the people of California, by more than a two-to-one margin, approved Proposition 1. It became effective the day following its enactment. *See* Cal. Const., art. IV § 24(a).

Proposition 1 amended article I, section 7(a) of the California Constitution to prohibit state courts from ordering mandatory student assignment or transportation unless necessary to remedy a specific violation of the Fourteenth Amendment. On November 15, 1979, the District applied, pursuant to article I, section 7(a), to modify the trial court's minute orders concerning Plan 2 and to "hold a hearing to determine whether a federal court, sitting today, would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation." (C.T. at 13315.) Although the parties filed extensive briefs on Proposition 1, the trial court deferred ruling on the District's application until the completion of the pending trial.

The trial ended on April 11, 1980, after 25 weeks of testimony, 12,000 pages of transcript, and 450 exhibits. On May 19, 1980, the trial court entered a minute order denying the District's application under article I, section 7(a) of the California Constitution. (C.T. at 16850.) On July 7, 1980, the trial court signed without alteration an eight-page set of findings of fact and conclusions of law petitioners had proposed for the May 19 minute order. (C.T. at 17448.) Neither the trial court's minute order nor the findings of fact ruled upon the constitutionality of Proposition 1. Instead the court held that the trial record from 1970 established *de jure* segregation in violation of the Fourteenth Amendment and that the constitutional question was therefore moot. (*Id.*)

On July 7, 1980, the trial court also entered an order, findings of fact and conclusions of law, which rejected the District's voluntary desegregation plan and ordered a new plan (termed "Plan 3") based on extensive mandatory reassignment of students. On July 10, 1980, the trial court, notwithstanding the District's appeal, ordered immediate implementation of Plan 3 pursuant to California Code of Civil Procedure § 1110b.

Although both the California Court of Appeal and the California Supreme Court declined to vacate the trial court's July 7 order by extraordinary writ of mandamus, the trial court's order was modified by two stay orders issued by the Court of Appeal during the summer of 1980. The principal effect of the stay orders was to require the trial court to exclude naturally desegregated schools from mandatory reassignment. On September 12, 1980, Justice Rehnquist denied the District's application to stay the trial court's July 7 order pending review by this Court. *Board of Education of City of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980).

The District commenced the 1980 school year on September 16, 1980, under Plan 3, as modified by the Court of Appeal's stay orders. Plan 3 remained in operation through April 10, 1981.

II.
PROCEEDINGS IN THE COURT OF APPEAL.

On July 10, 1980, the District filed two notices of appeal: the first concerning the trial court's order of May 19, 1980, regarding Proposition 1, and the second concerning the order of July 7, 1980. All other parties, including the petitioners, also appealed from the trial court's July 7 order.

The Court of Appeal expedited briefing, and on October 8, 1980, it bifurcated the appeal from the May 19 order

concerning Proposition 1 and the appeal from the July 7 order. The Court of Appeal heard argument on the Proposition 1 appeal on December 8 and filed its opinion on December 19, 1980.

Unlike the trial court, the Court of Appeal reached the question of the constitutionality of Proposition 1. The court declared Proposition 1 constitutional, and further held that the May 19 and July 7 orders violated Proposition 1 because the record did not contain evidence of intentional, *de jure* segregation. Accordingly, the Court of Appeal vacated the trial court's May 19 and July 7 orders, and remanded the case for further proceedings. On December 23, 1980, the Court of Appeal issued an order dismissing all appeals from the July 7 order as moot.

Following an unsuccessful petition for rehearing in the Court of Appeal, petitioners filed a petition for hearing in the California Supreme Court. That petition was denied on March 11, 1981, at which time the Court of Appeal's decision became final under state law. (*See* Cal. Rules of Ct. 24 and 25.)

III.

RECENT PROCEEDINGS IN THE STATE AND FEDERAL COURTS.

The Court of Appeal's remittitur was filed in the trial court on March 12, 1981. On March 16, 1981, the Board of Education adopted a resolution which ordered Plan 3 to be terminated and which gave parents of mandatorily reassigned students the option of returning their children to neighborhood schools or remaining in mandatory reassignment beginning on April 20, 1981, the first day of the fourth academic quarter. Petitioners filed a motion for preliminary injunction in the trial court, which was denied. The Court

of Appeal and the California Supreme Court each denied review of the trial court's ruling.

After the state courts had declined to enjoin the District's termination of Plan 3, one group of petitioners' attorneys filed a new action in the United States District Court for the Central District of California, entitled *Los Angeles NAACP, et al. v. Los Angeles Unified School District, et al.* (No. CV 81-1811 AWT). On April 17, 1981, the District Court issued a temporary restraining order prohibiting the termination of Plan 3. *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 513 F.Supp. 717 (C.D.Cal. 1981). That order was vacated by the Ninth Circuit Court of Appeals on the following day, April 18. *Los Angeles Unified School Dist. v. District Court*, 650 F.2d 1004 (9th Cir. 1981). On Easter Sunday, April 19, the federal plaintiffs filed an application with Justice Rehnquist, as Circuit Justice, to stay the order of the Court of Appeals. The application was withdrawn on Monday, April 20. (*See* No. A-875.)

On July 16, 1981, after full briefing and oral argument, the District Court denied plaintiffs' motion for preliminary injunction. The District Court also denied the District's motion to dismiss the case on the ground of abstention and *res judicata*, but it recently certified that ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On April 20, 1981, over 7,000 students (4,300 of whom were minority students) elected to end their participation in mandatory reassignment and return to their neighborhood schools. All students who remained in paired and clustered schools through the end of the 1980-81 school term did so on a voluntary basis.

The District has since developed an expanded voluntary desegregation plan for the 1981-82 school term, which was

submitted to the state trial court for approval. In late July and early August the trial court (Superior Court Judge Robert B. Lopez) held hearings regarding the District's plan and alternatives offered by all parties in the state court proceedings. On August 14, 1981, Judge Lopez concluded all proceedings on the District's voluntary plan (except for attorneys' fees motions by petitioners and intervenors) and now has the District's proposed plan and the parties' alternatives under submission.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEAL WAS CORRECTLY DECIDED AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR LOWER APPELLATE COURTS.

A. Proposition 1 Does Not Prohibit Mandatory Reassignment; It Only Conforms the Availability of That Remedy to the Requirements of the Fourteenth Amendment.

Petitioners have overstated the effect of Proposition 1. They claim that it "destroys" their right to an equal education, that it "forever denies" mandatory reassignment as a desegregation remedy, and that it imposes "enormous litigation burdens" on minority students. (Pet. at 34, 53, and 57.)

Proposition 1 does none of these things. As the Court of Appeal correctly held, it does nothing more than conform the California Constitution to the Federal Constitution in one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy. (Opinion, Appendix at 50A-63A.) Proposition 1 provides in relevant part:

> "In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such

party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."

Proposition 1 thus does not "destroy" or "forever deny" court-ordered mandatory assignment or transportation of students. It embraces the requirements of the Fourteenth Amendment and does not reject that decisive standard. The tools of mandatory assignment or transportation may still be ordered so long as a California state court finds a violation of the Fourteenth Amendment. Moreover, Proposition 1 does not create unconstitutional "litigation burdens" for minority plaintiffs any more than the Fourteenth Amendment itself. The standard of proof for establishing a right to mandatory reassignment or transportation is identical to the standard under the Federal Constitution. The error of petitioners' argument is illuminated by one indisputable fact: for years federal courts have ordered mandatory reassignment where that remedy is appropriate. Proposition 1 permits state courts to do the same.

The protection afforded by Proposition 1 is in fact even broader than the Fourteenth Amendment. Since Proposition 1 is concerned only with court-ordered reassignment or transportation of students, remedies which rely on other techniques are not affected. California state courts may still remedy *de facto* segregation by imposing desegregation plans based upon voluntary transfers of students. (*See* Opinion, App. at 55A-56A and 67A.) A federal court has no such power under the Federal Constitution.

Finally, Proposition 1 places no restriction whatsoever on local school boards that wish to adopt plans of mandatory reassignment or transportation. It expressly states that "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan."

B. Proposition 1 Does Not Violate the Fourteenth Amendment; It Specifically Embraces Its Protections and Provisions.

In September 1980, Justice Rehnquist analyzed the constitutionality of Proposition 1 as follows:

> "Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

Board of Education of City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980) (quoting Judge Cohn's order upholding the constitutionality of Proposition 1 in *Tinsley v. Palo Alto Unified School District*, No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980).

This analysis, which was adopted by the Court of Appeal (Opinion, App. at 62A), is based upon firmly established authority. This Court has made it clear that state constitutional provisions will be held to violate the Federal Constitution only when there is a clear conflict between state and federal law. Thus, in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), this Court held:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Accord, Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("[S]tate constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted

constitutional rights could not otherwise be protected and effectuated.").

Similarly, in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413-14 (1977), this Court held that the repeal or rescission of a state enactment (there, a resolution concerning school desegregation) violates the Federal Constitution only if the enactment itself was required by a preexisting federal constitutional duty. *Accord, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 531 n.5 (1979) ("*Dayton II*"); *Santa Barbara School Dist. v. Superior Court*, 13 Cal.3d 315, 328-30, 530 P.2d 605, 118 Cal.Rptr. 637 (1975).

There is nothing in Proposition 1 which conflicts with the Federal Constitution or circumvents federally protected rights or duties. Rather, Proposition 1 specifically embraces the Federal Constitution by providing for mandatory reassignment or transportation whenever permitted by the Fourteenth Amendment.

Proposition 1 closely parallels federal statutes enacted by Congress pursuant to its power to enforce the Fourteenth Amendment. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, places strict limitations on remedies which may be ordered to correct school segregation that does not violate the Fourteenth Amendment. Federal courts which have reviewed these provisions have concluded that "The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution." *Morgan v. Kerrigan*, 530 F.2d 401, 411 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); *accord, Hart v. Community School Board*, 512 F.2d 37, 52 (2d Cir. 1975). This is the same effect achieved by Proposition 1.

Many of the same arguments which petitioners have made in this case were rejected in *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980), which was brought to attack portions of the 1974 Equal Educational Opportunities Act. The provisions in question prohibited the Department of Health, Education and Welfare from requiring mandatory student reassignment as a condition to receiving federal education funds. The District Court upheld the act's constitutionality because its provisions, like those of Proposition 1, do not totally prohibit mandatory reassignment but simply remove one setting in which it can originate. 455 F.Supp. 837, 841 (D.D.C. 1978).

On appeal, plaintiffs argued that the provisions were unconstitutional because they hampered HEW's efforts to desegregate schools and therefore impermissibly involved the federal government in the preservation of school segregation, and because the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Court of Appeals, in an opinion by Judge Bazelon, rejected both arguments and affirmed the trial court's ruling. The court's discussion applies equally to Proposition 1:

> "[A]ppellants assert that the amendments, by their plain terms, effect and purpose, violate the fifth amendment by eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim: the amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either argument."
>
> 627 F.2d at 1230.

In contrast to Proposition 1, the authorities upon which petitioners rely all involved state statutes and constitutional provisions which conflicted with, rather than embraced, the Fourteenth Amendment. *Reitman v. Mulkey*, 387 U.S. 369 (1967), for example, concerned a constitutional amendment which effectively repealed fair housing statutes and guaranteed that a person could decline to sell, lease or rent real property to anyone he or she desired. Although this Court emphasized that a state does not violate the Federal Constitution by repealing laws concerning racial discrimination, it held, in a 5 to 4 decision, that the California amendment was unconstitutional because the State had affirmatively "authorized and constitutionalized" a private right of racial discrimination which significantly encouraged and involved the State in purposeful and intentional private discrimination. 387 U.S. at 376.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court reiterated that the repeal of an existing state law concerning racial discrimination does not violate the Fourteenth Amendment. 393 U.S. at 390 n.5. However, it held unconstitutional an Akron, Ohio city charter amendment which required all ordinances concerning housing discrimination on the basis of race, religion or national origin to be approved by a majority vote of the city electorate after passage by the city council. All other ordinances did not require such approval and became effective immediately upon passage by the council. This Court held the charter amendment directly violated the Fourteenth Amendment because it "was an explicitly racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389.

Unlike the Akron charter amendment in *Hunter*, Proposition 1 does not create an explicit racial classification. To the extent Proposition 1 creates a classification at all, it does

so among the various desegregation remedies available to California state courts to correct *de facto* segregation. Mandatory student assignment and transportation, a severe remedy which imposes unique burdens, may now be ordered only if the evidence establishes a Fourteenth Amendment violation. *Cf., James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (refusing to extend *Hunter* because the California constitutional provision in question did not create an explicit racial classification).

The Akron amendment in *Hunter* differs from Proposition 1 in another fundamental respect. The Akron amendment imposed burdens without regard to the provisions of the Federal Constitution. In contrast, Proposition 1 incorporates the same rights and duties established by the Fourteenth Amendment.

Petitioners also have cited cases involving state statutes and constitutional provisions concerning mandatory reassignment or transportation of students. Unlike Proposition 1, however, each of those provisions *flatly prohibited* reassignment of students. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43, 44 n.1 (1971) (statute prohibited busing of students under any circumstances); *Seattle School Dist. v. State of Washington*, 633 F.2d 1338, 1341 (9th Cir. 1980) (statute prohibited school boards from voluntarily adopting desegregation plans based on mandatory reassignment); *Lee v. Nyquist*, 318 F.Supp. 710, 712 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) (statute prohibited school boards from mandatorily reassigning students without parental consent); *Santa Barbara School Dist. v. Superior Court*, 13 Cal.3d 315, 323, 118 Cal.Rptr. 637, 530 P.2d 605 (1975) (statute prohibited mandatory reassignment of students based upon race); *San Francisco Unified School Dist. v. Johnson*, 3 Cal.3d 937, 942, 92 Cal.Rptr. 309, 479 P.2d 669 (1971), *cert. denied*, 401 U.S.

1012 (1971) (statute prohibited school boards from mandatorily reassigning students without parental consent); *School Committee v. Board of Education*, 366 Mass. 315, 319 N.E.2d 427, 432 (1974), *cert. denied*, 421 U.S. 947 (1975) (statute prohibited the state board of education from ordering student reassignment).

Unlike the provisions in those cases, Proposition 1 does not prohibit mandatory reassignment or transportation of students. That remedy is still available to California state courts so long as a Fourteenth Amendment violation is established by the evidence and the remedy is permissible under federal law. Moreover, local school districts are free to implement mandatory reassignment under any circumstances.

C. By Conforming the California Constitution to the Federal Constitution, Proposition 1 Does Not Have an Unconstitutional Purpose or Effect.

Although petitioners have relied extensively on this Court's opinion in *Reitman v. Mulkey*, 387 U.S. 369 (1967), they have ignored one of its principal holdings. In *Reitman*, the California Supreme Court examined the "immediate objective," "ultimate effect," and "historical context" of Proposition 14 and concluded that the proposition unconstitutionally involved the state in private racial discrimination concerning housing matters. In affirming, this Court granted extreme deference to the conclusions drawn by the California Supreme Court:

> "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 14], and familiar with the milieu in which that proposition would operate, has determined that the provision would involve the State in private racial discriminations to an

unconstitutional degree. We accept this holding of the California court."

387 U.S. at 378-79; *accord*, 387 U.S. at 373-74 and 381.

Petitioners contend that an examination of the "immediate objective," "ultimate effect," and "historical context" of Proposition 1 demonstrates a similarly unconstitutional purpose and effect. However, the California Court of Appeal, the state court of highest resort in this case, has conducted the same analysis that was made in *Reitman* and has concluded that Proposition 1 does not have a discriminatory purpose or effect. As in *Reitman*, the California court's determination should be afforded great respect.*

Petitioners have argued at length about the California electorate's purpose and intent in enacting Proposition 1. However, as this Court has declared:

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."

United States v. O'Brien, 391 U.S. 367, 383 (1968); *accord, Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980).

To the extent the electorate's intent is relevant at all, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), makes it clear that petitioners have failed to satisfy

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*The California Supreme Court's denial of the petition for hearing in this case should not be regarded as without significance. In *Eisenberg v. Superior Court*, 193 Cal. 575, 578, 226 P. 617 (1924), the California Supreme Court said "The order of this court denying a petition for transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in that opinion." *Accord, DiGenova v. State Board of Education*, 57 Cal.2d 167, 178, 367 P.2d 865, 18 Cal. Rptr. 369 (1962).

their burden of establishing a specific intent to injure minority students. In *Feeney*, this Court examined a Massachusetts statute which gave generous hiring preferences to veterans and which produced an admittedly "severe" impact on the employment opportunities of women. 442 U.S. at 271. The Court upheld the statute despite its foreseeable adverse effect on women, because the plaintiff failed to prove that the veteran's preference "was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." 442 U.S. at 279.

The materials offered by petitioners to "prove" the electorate's intent regarding Proposition 1 are extraordinarily unreliable and inadmissible and are not properly before this Court. The materials consist of newspaper clippings, campaign literature and other unofficial documents. (*See* App. at 94A-104A; C.T. at 14071-200.) They were filed with the trial court and "authenticated" by a declaration from one of petitioners' attorneys, who simply said that he had examined them. Petitioners never asked the trial court to take judicial notice of these materials, and the court never did so on its own motion. The District moved to strike the materials (C.T. at 14375), but the trial court never ruled on the District's motion (C.T. at 16582). The trial court did not make any findings about the purpose or effect of Proposition 1, and it declined entirely to rule on the constitutionality of the proposition. After reviewing these same materials, the Court of Appeal concluded that petitioners' arguments about the electorate's intent were "pure speculation." (Opinion, App. at 64A.)

Under these circumstances, the acceptance of petitioners' arguments about the purpose and effect of Proposition 1

would require this Court to review evidence which is not properly in the record and to make findings of fact which directly contradict the conclusions of the Court of Appeal.

D. Proposition 1 Does Not Retroactively Deprive Petitioners of Any Vested Right.

Petitioners claim that Proposition 1 deprives them of previously adjudicated rights, but they have failed to cite a preexisting judgment or order which entitles them to the remedy of mandatory reassignment. In fact, none exists. Moreover, the California state courts reviewed the arguments petitioners have presented here and concluded that Proposition 1 does not deprive petitioners of any vested rights under the prior orders entered by those same state courts.

In the California Supreme Court's first review of *Crawford* in 1976, no specific remedial desegregation plan was before the court. 17 Cal.3d at 302. In remanding with instructions for the trial court to oversee development and implementation of a plan, the court specifically refrained from holding that mandatory assignment or transportation of students was constitutionally required. 17 Cal.3d at 309-10.

After initial proceedings upon remand, the District itself proposed Plan 2, which relied extensively on mandatory reassignment of students. Petitioners opposed Plan 2, but the trial court approved its implementation beginning in September 1978. Within weeks after the commencement of Plan 2, petitioners joined in a motion to terminate the plan and substitute a new court-designed plan.

By September 1979 all parties, including petitioners, wanted Plan 2 discontinued. The trial court commenced hearings to consider alternatives to Plan 2 on October 22, 1979. Shortly after commencement of those hearings, on

November 15, 1979, the District invoked Proposition 1 in an application filed with the trial court.

Thus, at the time the District invoked Proposition 1 in November 1979, there was no preexisting judgment or order which gave petitioners a "vested right" to mandatory reassignment. Contrary to the impression which they seek to convey, Proposition 1 was enacted and invoked at a time when the trial court was in the early stages of a six month trial to determine the remedy required by the California Constitution.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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